73-246

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ——

IN THE MATTER OF FAIRFIELD PRODUCTS, INC., a corporation, BANKRUPT,

Respondent,

vs.

JOHN MAKENS and RAY MAKENS and MARY MAKENS, ADMINISTRATORS of ESTATE of JAMES MAKENS, DECEASED, APPELLANTS and AGGRIEVED PARTIES,

Petitioners and Appellants.

PETITION FOR WRIT OF CERTIORARI

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KEENAN PRINTING COMPANY 368

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Petitioner, John Makens, et al respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered in this proceeding on the June 19, 1973. A Petition for Rehearing was denied on July 9, 1973.

THE OPINION BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in the Appendix as pages one through five infra.

JURISDICTIONAL STATEMENT PURSUANT TO RULE 15 OF RULES OF U. S. SUPREME COURT

The judgment and opinion of U. S. Court of Appeals, Eighth Circuit entered in this proceeding on June 19, 1973 as stated in its opinion was "Not to be printed or published" (See opinion).

Jurisdiction of the Court is invoked because both the lower federal court at Sioux Falls, South Dakota, and U. S. Circuit Court of Appeals, Eighth Circuit, St. Louis, Mo., disregarded completely constitutional rights of these appellants guaranteed them by the Seventh Amendment of the U. S. Constitution in that their rights of Trial by Jury were denied them by these appellants failure to receive Trial by Jury, the record showing that an appearance and Jury Demand having been filed under date of May 15, 1973 prior to order of adjudication in bankruptcy entered by lower federal court at Sioux Falls, South Dakota under date of May 17, 1973. Said record shows further that John M. Giltinon on behalf of his clients asserted this contention in appellants motion to vacate order of adjudication in bankruptcy, in which formal order of denial of said motion was entered by lower federal court at Sioux Falls, South Dakota, on May 23, 1973, from which order Notice of Appeal was promptly made. Appellants herewith append photostatic copy of Seventh Amendment of U. S. Constitution attached hereto.

QUESTIONS PRESENTED

Can a lower federal District Court of the United States at Sioux Falls, South Dakota, under date of May 17, 1973 and again under date of June 23, 1973, completely disre-

gard the rights of these appellants to a Trial by Jury previously demanded May 15, 1973 on the question of insolvency of Fairfield Products, Inc., a corporation, and order its adjudication in bankruptcy without notice and ex parte (where record shows on May 15, 1973, proper demand for Trial by Jury was filed by these appellants (minority stockholders and directors)? Can three directors by a questionable corporate resolution have their corporation known as Fairfield Products, Inc., a corporation, adjudicated a bankrupt to the prejudice of two directors and minority stockholders (these appellants)? Can this Honorable Court condone the actions of Joe W. Cadwell, attorney for petitioning creditors and also counsel for Fairfield Products, Inc., a corporation, Bankrupt, wherein he is attorney of record for conflicting parties in interest.?

STATEMENT OF THE CASE

These appellants, John Makens, and Ray Makens and Mary Makens, Administrators of Estate of James Makens, Deceased, being directors and holders of 44% of stock in Fairfiield Products, Inc., a corporation, retained their attorney, John M. Giltinon, to enter their appearances on May 15, 1973 and Demanded Trial by Jury on the question of alleged insolvency of Fairfield Products, Inc., Bankrupt, reflected by record herein. That lower Federal District Judge, Fred E. Nichol, under date of May 17, 1973 adjudicated said company as a bankrupt ex parte and without a hearing to these appellants and under date of May 23, 1973, denied these appellants motion to vacate said order of adjudication in bankruptcy, appointed Referee Peder K. Ecker, as a Referee in Bankruptcy, permitted the appointment of Bruce A. Blake, as Receiver,

permitted Bruce A. Blake as Trustee to sell the company's assets under date of July 23, 1973 to Midwest Food Sales, Inc., for One Thousand Dollars ($1,000.00), all to the prejudice of these appellants minority directors and holders of 44% of stock in Fairfield Products, Inc., a corporate adjudged bankrupt.

REASONS FOR GRANTING THE WRIT

The decision on the U. S. Circuit Court of Appeals, 8th Circuit, entered on June 19, 1973, its order of even date, its denial of a petition for rehearing under date of July 9, 1973 is in complete disregard of the decision of the 5th Circuit Court of Appeals in Case entitled Porterfield v. Gersten reported in 222 Federal (2) 137, wherein it was decided that minority stockholders and directors have the right of counsel and the right of representation to appear and contest an adjudication in bankruptcy particularly where majority stockholders and directors have by fraud permitted the company to be ajudicated bankrupt.

The decision of the U. S. Circuit Court of Appeals, 8th Circuit, is in such direct conflict and variation to the decison of the U. S. Circuit Court of Appeals, 5th Circuit, in the Porterfield case cited that it is required that U. S. Supreme Court by issuance of this petition for Writ of Certiorari reconcile this conflict, and in particularly resolve the conflict, the matter being of importance in the administration of the Bankruptcy Act (New York v. Saper, 336 U. S. 328). Attention of this Honorable Court is called to Rule 19 of U. S. Supreme Court Rules 19 (b) where a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so

far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

The decision of the U. S. Circuit Court of Appeals, 8th Circuit, is in such direct conflict and variation to decisions cited by these appellants in oral argument at St. Paul, Minn., on June 11, 1973 and also in their petition for rehearing filed on June 27, 1973 in which rehearing was denied on July 9, 1973, that under Rule 19 (b) of U. S. Supreme Court Rules, where a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

The decision of the U. S. Circuit Court of Appeals, 8th Circuit, is in such direct conflict and variation to decisions cited by these appellants in oral argument at St. Paul, Minn., on June 11, 1973 and also in their petition for rehearing filed on June 27, 1973 in which rehearing was denied on July 9, 1973, that under Rule 19 (b) of U. S. Supreme Court Rules, where a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision, namely, cases cited, being In Re: Thomas, 211 Federal Supplement 187; also reported in 327 Fed. (2) 667; petition for certiorari denied by U. S. Supreme Court 379 U. S. 827; also Elliott vs. Tolpers, 187 U. S. 327; Burns Bros. v. Cook Coal Co., 42 Federal (2) 109; In re: Naftallin & Co., 315 Federal Supplement 463, stating that the right of Trial by Jury is absolute. These decisions in the opinion of counsel for these petitioners and appellants are unchallenged and controlling and should be decisive in this Honorable Court as an

added reason for the granting of petition for Writ of Certiorari.

CONCLUSION

For these many reasons assigned, the Court is urged to grant a Writ of Certiorari.

Respectfully submitted,

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Signature of Counsel
Member of U. S. Supreme Court
of United States of America Bar
Admitted April 27, 1936.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1349

In the Matter of FAIRFIELD PRODUCTS, INC., a corporation, Bankrupt,	Appeal from the United States District Court for the Northern Division of North Dakota

Submitted: June 11, 1973

Filed: June 19, 1973

Before HEANEY, BRIGHT and ROSS, Circuit Judges.

PER CURIAM.

This case comes to us on a pleading entitled "Motion by Appellants and Aggrived [sic] Parties in Interest for a Stay Order and to Enjoin Adjudication in Bankruptcy Entered by District Court at Sioux Falls, S.D., on May 23, 1973." We dismiss the appeal.

A creditor's petition was filed by three creditors of Fairfield Products, Inc. (Fairfield) on May 4, 1973, al-

leging that Fairfield was bankrupt. On May 15, 1973, attorney John M. Giltinon filed a response thereto, ostensibly on behalf of Fairfield, and requested a jury trial on the issue of Fairfield's alleged insolvency. It was later determined that Mr. Giltinon had not been authorized to represent Fairfield by its board of directors, but had been retained by two directors and minority stockholders. On May 15, 1973, a majority of the five directors of Fairfield voted to authorize its president to sign and file an Admission and Confession of Bankruptcy; this document was duly executed and filed with the Clerk of the United States District Court on May 16, 1973. Pursuant to that Admission and Confession of Bankruptcy, Judge Nichol adjudicated Fairfield a bankrupt on May 16, 1973.

Mr. Giltinon filed an application to vacate the adjudication of bankruptcy on May 18, 1973, and on the same date secured from Judge Beck a "Temporary Injunctional Order" enjoining certain creditors "pursuant to . . . Chapter 11 of the Bankruptcy Act" and setting a hearing on the question of making the injunction permanent for July 9, 1973. (Judge Beck refused to vacate the order of Judge Nichol of May 16, 1973.) On May 22, 1973, a hearing was held before Judge Nichol on the application to vacate the order of adjudication. On May 23, 1973, Judge Nichol filed his order declining to vacate his order of adjudication of May 16, 1973.

This Court has carefully considered the pleadings and briefs of the parties, together with the complete record from the district court, and we conclude that Judge Nichol was correct in making his order of adjudication of bankruptcy on May 16, 1973, and in declining to vacate that order on May 23, 1973. It is clear from the record that

the duly constituted officers of Fairfield, acting upon written authorization of a majority of its directors, consented to the adjudication, thereby giving the district court the right to make is adjudication of bankruptcy. A minority of the directors holding a minority of the outstanding stock does not have the right to file pleadings on behalf of the corporation and the attempt to do so by Mr. Giltinon on behalf of his clients is at best, questionable practice.

Since this appeal was not brought by any duly authorized representative of Fairfield, Mr. Giltinon and his clients have no standing to question the orders of Judge Nichol in this case, and the appeal is hereby dismissed. All costs of this appeal are taxed to Mr. Giltinon.

NOT TO BE PRINTED OR PUBLISHED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1349 September Term, 1972

No. 73-1349

In the Matter of: FAIRFIELD PRODUCTS, INC., a corporation, Bankrupt, JOHN MAKENS, et al., Appellants, vs. JOE CADWELL, Appellee.	Appeal from the United States District Court for the District of South Dakota

Petition of appellants for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 9, 1973

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

72-1349 September Term, 1972

In the Matter of:
FAIRFIELD PRODUCTS, INC., a corporation, Bankrupt,
JOHN MAKENS and RAY MAKENS and MARY MAKENS as Administrators of the Estate of JAMES MAKENS, Deceased,
Appellants,
vs.
JOE CADWELL,
Appellee.

Appeal from the United States District Court for the District of South Dakota

By order dated July 17, 1973, this court directed that the issuance of mandate in this cause be stayed for a period of thirty days from and after that date pending filing of application for writ of certiorari by counsel for appellants. The court has now considered a pleading filed by counsel for appellee in resistance to appellants' motion for stay of mandate and, being fully advised in the premises, it is now here ordered that the court's order of July 17, 1973, be, and it is hereby, amended to provide that issuance of stay of mandate in this cause be, and it is hereby, stayed to and including August 1, 1973. Counsel for appellants is directed to make application in the Supreme Court of the United States for further stay of mandate and, unless the clerk of this court receives a copy of an order entered by the Supreme Court of the United States providing for additional stay of mandate on or prior to August 1, 1973, the mandate of this court is to issue at that time.

July 23, 1973

POOR COPY

The two of the original proposed amendments which were not ratified by the necessary number of States related, the first to apportionment of Representatives; the second, to compensation of members.

ARTICLE I.

Religious Establishment Prohibited. Freedom of Speech, of the Press, and Right to Petition.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

ARTICLE II.

Right to Keep and Bear Arms.

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

Conditions for Quarters for Soldiers.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

ARTICLE IV.

Right of Search and Seizure Regulated.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

Provisions Concerning Prosecution. Trial and Punishment—Private Property Not to Be Taken for Public Use Without Compensation.

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

Right to Speedy Trial, Witnesses, etc.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII.

Right of Trial by Jury.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ARTICLE VIII.

Excessive Bail or Fines and Cruel Punishment Prohibited.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

Rule of Construction of Constitution.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

Rights of States Under Constitution.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendments Since the Bill of Rights

ARTICLE XI.

Judicial Powers Construed.

The following amendment was proposed to the Legislature of the several States by the Third Congress on the 5th of March 1794, and was declared to have been ratified in a message from the President to Congress, dated Jan. 8, 1798.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state.

(It was on Jan. 5, 1798, that Secretary of State Pickering received from 12 of the States authenticated ratifications, and informed President John Adams of that fact.)

As a result of recent research in the Department of State, it is now established that the Eleventh Amendment became part of the Constitution on Feb. 7, 1795, for on that date it had been ratified by twelve States as follows:

(1) New York, (March 27, 1794); (2) Rhode Island, (March 31, 1794); (3) Connecticut, (May 8, 1794); (4) New Hampshire, (June 16, 1794); (5) Massachusetts, (June 25, 1794); (6) Vermont, (between Oct. 9, 1794 and Nov. 9, 1794); (7) Virginia, (Nov. 18, 1794); (8) Georgia, (Nov. 29, 1794); (9) Kentucky, (Dec. 7, 1794); (10) Maryland, (Dec. 26, 1794); (11) Delaware, (Jan. 23, 1795); (12) North Carolina, (Feb. 7, 1795).

On June 1, 1796, more than a year after the Eleventh Amendment had become part of the Constitution (but before anyone was officially aware of this), Tennessee had been admitted as a State; but not until Oct. 19, 1797, was a certified copy of the resolution of Congress proposing the amendment sent to the Governor of Tennessee (John Sevier) by Secretary of State Pickering, whose office was then at Trenton, New Jersey, because of the epidemic of yellow fever at Philadelphia; it seems, however, that the Legislature of Tennessee took no action on the Eleventh Amendment, owing doubtless to the fact that public announcement of its adoption was made soon thereafter.

Besides the necessary twelve States, one other, South Carolina, ratified the Eleventh Amendment, but this action was not taken until Dec. 4, 1797, the two remaining States, New Jersey and Pennsylvania, failed to ratify.

ARTICLE XII.

Manner of Choosing President and Vice-President.

The following amendment was proposed to the Legislatures of the several States by the Ninth Congress Dec. 12, 1803, and was declared to have been ratified in a proclamation by the Secretary of State September 25, 1804.

The Electors shall meet in their respective States, and vote by ballot for President and Vice-President one of whom at least shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then, from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

TITLES OF NOBILITY—*Not Ratified*

Congress, May 1, 1810, proposed to the States the following Amendment to the Constitution:

"If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States and shall be incapable of holding any office of trust or profit under them or either of them."